Petition

81-652

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ROBERT H. ARNOLD AND NANCY C. ARNOLD
Petitioners,

VS.

CNA FINANCIAL CORPORATION
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Robert H. Arnold
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Pro Se

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QUESTIONS PRESENTED FOR REVIEW

Whether the decision below conflicts with the decisions of the Supreme Court of Vermont on the law of bailment, as well as with universally accepted bailment law principles.

Whether citizens need to be heard, since courts represent their only recourse to have property rights upheld; as well as whether federal courts have a duty to follow state decisions.

Whether the Second Circuit's pronouncements as to the "uncontroverted testimony of Goolsbee" (Appendix A - Judgment par. 1) should be allowed to stand (a) since Chief Judge Holden just prior to trial allowed the corporate defendant to take Goolsbee's deposition in the opposite end of the country (Houston, Texas) affording the plaintiffs no time or economic opportunity for attendance; (b) since even if CNA

was but a gratuitous bailee -- despite evidence to the contrary - CNA clearly owed a duty of some affirmative action to help protect the plaintiffs' property; and (c) since the evidence showed that CNA was not a mere accommodator as CNA received the benefit of rents as a result of the bailment arrangement.

Whether the Second Circuit's pronouncement in par. 2 of the Judgement (Appendix A) is not clearly incorrect since both parties on February 28, 1980, agreed before the judges of the Second Circuit that CNA had reflected total or "gross neglect" which amounts to absolute incompatibility with the term "good faith".

Whether the trial judge did not abuse his discretion by refusing to allow the jury to view the multi-page document prepared by the plaintiffs during trial at the judge's direction, a document of such length and

detail that it could not possibly be absorbed by a jury's mere listening to a reading of the contents some time earlier.

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FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert H. Arnold and Nancy C. Arnold (hereinafter Petitioners) respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals For The Second Circuit filed February 29, 1980, affirming the order of the District Court of Vermont sitting in Brattleboro of July 26, 1979 (Appendix A, p. A-1) and from the Second Circuit's denial of Petitioners' Motion For Reconsideration filed May 14, 1980 and marked "denied" on July 7,

1981. (Appendix B, p. B-1)

OPINIONS BELOW

No opinions are known by the Petitioners to be officially reported dealing with this case. The judgment of the Second Circuit affirming the order of the District Court of Vermont is set forth in Appendix A-1 as aforementioned. The denial of Petitioner's Motion for Reconsideration is set forth in Appendix B-1 as aforementioned.

JURISDICTION

The denial of the Petitioners' Motion For Reconsideration, filed in the United States Court of Appeals for the Second Circuit following entry of judgment, was entered July 7, 1981. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1245(1).

STATEMENT OF THE CASE

Petitioners, residents of Connecticut,

owned a Vermont farmhouse. The defendant-respondent has a main office in Chicago, Illinois and an office of a real estate subsidiary located in the same Vermont village as Petitioner's realty. Respondent owned considerable acreage, barns, houses and other properties surrounding Petitioners'. The sale was part of a settlement of a property and land association dispute. Because Respondent was slow in attempting to conclude legal paper work on the agreed farm sale and because Vermont's "mud season" meanwhile had set in, Petitioners were prevented from removing their Vermont possessions from the previously owned farm house - one partly subletted and furnished - before Petitioners had to leave the United States on business.

Accordingly, Petitioners asked permission of the Respondent to leave their possessions in the recently sold farm house. This permission was granted. (Transcript: pp. 103-

108; 193-195) It also allowed Respondent corporation to retain former lessees of the Petitioners in a portion of the farm house and thereby received rents. Title finally passed to the Respondent or to its nominee shortly before the Petitioners had to leave for abroad. While Petitioners were away, a fire consumed part of the farm house. Although the Respondent's agents, servants and employees frequently had been in contact with the Petitioners prior to the property sale and had Petitioners' home and business telephone numbers and addresses, no effort was ever made by the Respondent, either through persons in its Chicago home office, or through its Vermont land subsidiary office located a short distance from the recent sold farm, to make any type of contact with any family member, business associate or employee of the Petitioners of the fire occurrence. No effort was made by the Respondent, its Chicago or Vermont agents or

employees, to reposition, remove, or in any way preserve Petitioners' personalty in the farm house, but undamaged in several rooms. No doors or windows, broken during the fire fighting efforts, were ever boarded up by the Respondent. No "No Trespassing" or other type of signs were ever placed on or about the farm property in an effort to prevent or discourage thieves. Upon returning to the United States some weeks after the fire, Petitioners first heard of the fire from former tenants, including one who had camped on the premise's lawn. She advised Petitioners (Transcript: p. 43, ll. 11-12; p. 64 ll 10-16) that several trucks had openly come to the fire-damaged house and removed Petitioners' undamaged personalty, all such activity having been assumed by this former tenant to have been carried out with either the Petitioners' or the Respondent's knowledge and permission, either or both.

REASONS FOR GRANTING THE WRIT

OR

ARGUMENT

1. Vermont bailment law was enunciated clearly in Jobidon v. Lussier, 124 Vt. 242, 204 A.2d 88 (1964). Here the court adopted the rule stated by Professor Warren Seavey from his article, "Reliance Upon Gratuitous Promises or Other Conduct" (64 Harvard L.R. p. 918). The Vermont court quoted Professor Seavey as follows:

> "Where a person represents by word or act that he has done or will do something upon the performance of which he should realize that others will rely, he is liable for expectable harm caused by the reliance of others and his failure of performance, if his represenation was negligent or intentionally false, or if without excuse he fails to perform."

This was a central case argued and relied upon by the Petitioners, but not followed by the trial judge; nor was it given recognition by the Court of Appeals for the Second Circuit.

Even if only a naked bailee, the defendant had a duty to take some care to protect the bailed property from possible damage or theft and the defendant's non-feasance was legally sufficient to impose liability. The trial court failed to so do. (Transcript: p. 251 @ line 8 through p. 255, line 9. THE CHARGE). The jury's sole duty was to determine damages sustained by the Petitioners from the subsequent theft of their personalty or from damage to it because the defendant had made no effort to prevent its exposure to elements or trespassers.

Hyde v. Moffatt, 16 Vt. 271 (1884) and Wetmore v. B. W. Hooker Co., Inc., 111 Vt. 519 (1941) both reflect that: " ... The meaning of diligence is that which the bailee uses in his own affairs." So too does Jobidon v. Lussier, supra. On the facts presented to the District Court, and

on the facts agreed to by both parties in their presentations to the Court of Appeals for the Second Circuit, the Respondent not only agreed there had been a bailment established between the parties, (Transcript: pp. 103-108; 195-196; Appellee's Brief @ p. 2 line 9) but admitted no care or diligence whatsoever was exercised with respect to treatment of the bailed property; that no effort was made to advise family members, agents or employees of the absent personalty owners that a fire had occurred, and that efforts easily could have been undertaken to protect and preserve the considerable personalty of the Petitioners resting in the partly destroyed farm house.

2. While the claim here is for property and involves only two citizens, the only place they can go to seek redress is to the court. Law abiding citizens need to be heard and have their property rights upheld

when persons, and especially large corporations, remain indifferent after having failed to perform some type of minimal duty which the law requires be carried out. It is clearly the duty of federal courts to follow state decisions on matters of general law: Russell v. Todd, 309 U.S. 280 (1940); Guaranty Trust v. York, 326 U.S 99 (1945).

3. The decision below created an improper and irreconcilable conflict between it and the highest court of Vermont on the general law of bailment and such conflict should not be perpetuated: Six Companies v. Highway District, 311 U.S. 180; West v. American T. & T. Co., 311 U.S. 223; Storer v. New York Life Ins. Co., 311 U.S. 464.

4. If the decision below is not reversed, not only will the law of Vermont on bailments have been improperly followed, the Petitioners will continue to be wrongfully deprived of their constitutional

rights to recovery of property lost from Respondent's total disregard of its minimal duties as a bailee - even as a naked bailee - compounded and perpetuated by the improper rulings of both lower courts: U. S. Constitution, Fifth and Fourteenth Amendments thereof.

5. Allowing the decision below to stand would constitute a continuing violation of Petitioners' rights to have no property taken without due and proper process of law having first been followed, including property lost or, in effect taken, through the callous indifference of a very large corporation, its servants, agents or employees. This clearly involves the U. S. Constitution, Fifth and Fourteenth Amendments thereof. 16 Am. Jur. 2d, Section 580. Under the Fourteenth Amendment, "due process" emphasizes fairness between the state and the individual dealing with it.

Ross v. Moffatt, 417 U.S. 600. Misapplying bailment requirements enunciated by the Supreme Court of Vermont to the Petitioners' detriment and property value deprivation amounts to violation of both the Fifth and Fourteenth Amendments of the United States Constitution and to depriving Petitioners of a fundamental, natural, inherent and inalienable right.

6. If a federal district court should have noted a wrongful legal result, based on law or fact, granting a new or even a partial new trial is clearly proper. Capital Traction Co. v. Hof, 174 U.S. 1, 19 S. Ct. 580 (1899) Our courts have the power to examine the whole of any case on both the law and the evidence with a view to securing a result that is not merely legal, but also a result not against justice. Otherwise the jury system would be capricious and an intolerable tyranny. Aetna Casualty and

Surety Co. v. Yeatts, 122 F.2d 353 (1941).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted

ROBERT H. ARNOLD and
NANCY C. ARNOLD
Pro Se Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT H. ARNOLD and NANCY C. ARNOLD, Plaintiffs and Appellants	NO: 79-7607
VS.	ORDER, JUDGMENT AND DECREE UPHOLDING ORDER OF DISTRICT COURT OF VERMONT
CNA FINANCIAL CORPORATION Defendant and Appellee	

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by Appellants pro se.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed.

1. Chief Judge Holden did not abuse his discretion in denying Arnold's motion for a new trial. The uncontroverted testimony of Goolsbee, CNA's assistant general counsel, clearly establishes that he granted

Arnold permission to store his household furnishings and personal property on CNA"s farm simply as an "accommodation" to Arnold, and not with any expectation of gain or benefit to CNA. Accordingly, Judge Holden correctly instructed the jury that CNA was a gratuitous bailee. Wetmore v. B. W. Hooker Co., 18 A.2d 181, 184 (Vt. 1941).

2. Under Vermont law, a gratuitous bailee "is answerable only for fraud or gross neglect, and not for such ordinary inattention as may be compatible with good faith. The measure of diligence is that which the bailee uses in his own affiars." Jobidon v. Lussier, 204 A.2d 88, 91 (Vt. 1964). Moreover, a gratuitous bailee may not be held accountable for nonfeasance alone, or mere passive neglect, but only for active malfeasance. Hyde v. Moffat, 16 Vt. 271, 274 (1844). In light of the absence of any evidence suggesting anything more than

nonfeasance on CNA's part, Judge Holden's charge to the jury properly emphasized Arnold's burden to prove that CNA's inaction was attributable to gross neglect and thus incompatible with good faith. Jobidon v. Lussier, supra.

3. Plaintiff's Exhibit 40-a was not offered by Arnold during trial, but simply used by him during his oral testimony to refresh his recollection. Consequently, the contents of the document were simply cumulative of Arnold's oral testimony, and, therefore, excludable under Fed. R. Evid. 403. In view of Arnolds' failure to offer the document at a time when CNA could reasonaby cross-examine its author on its contents, as well as Judge Holden's willingness to permit the jury to re-examine Arnold's testimony on the subject matter of the document, the trial judge's decision to exclude the document from the jury's delib-

eration was well within his discretion under Fed. R. Evid. 403.

IRVING R. KAUFMAN,
CHIEF JUDGE
WILLIAM H. TIMBERS,
CIRCUIT JUDGE
HENRY F. WERKER,
DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT H. ARNOLD and NANCY C. ARNOLD, Plaintiffs	)	NO: 79-7607
	)	MOTION FOR
VS.	)	RECONSIDERATION
	)	
CNA FINANCIAL CORPORATION	)	

Brief statement of the relief requested:

Motion for reconsidering (1) Facts admitted by defendant's counsel following plaintiff's Feb. 28, 1980, argument to 2nd Circuit; (2) Applicable law based on facts as presented at the trial before Holden, J. - of District Court and his July 26, 1979, ruling and on the law presented in Plaintiffs' brief to 2nd Circuit Court and also its law statements attached hereto.

Previous requests for similar relief and disposition: None.

Statement of issue(s) presented by this motion:

(1)That defendant admitted on Feb. 28,

1980, before the 2nd Circuit panel that a bailment involving consideration in fact had existed; and (2) that under Vermont law, the defendant, as either a gratuitous bailee or one for consideration, had a duty to the Plaintiffs to take some affirmative act, no matter how slight, to protect the bailed goods following the fire and/or to advise Plaintiffs or their agents, employees or family members of the fact of the fire and resulting exposed condition of the premises and also the undamaged personalty therein.

Brief statement of the facts (with page references to the moving papers): Defendant made no effort to remove undamaged goods of Plaintiffs' from the Vermont farm house undamaged by fire after the fire was extinguished; and made no effort to block entrances to the property or to place signs warning others to remain away from the premises or to advise agents or family of

plaintiffs (known by Defendant to be in Europe) in Connecticut, whose addresses and phone numbers long had been known by Defendant. PP. 3-5 of Plaintiffs' attached Motion for Reconsideration.

Summary of the argument (with page reference to the moving papers): Defendant was a bailee which in fact received consideration from the bailment as stated by Plaintiffs on Feb. 28, 1980 in oral argument and agreed to by Defendant's attorney in his argument. Accordingly, Defendant had a higher duty of care with respect to the bailed property than a naked or gratuitous bailee. Under Vermont law, Defendant has a duty to take some affirmative action - no matter how slight - to treat the bailed property as if it were its own, whether bailee was a gratuitous bailee or received some type of consideration from the bailment facts. Under Vermont law, any bailee which neglects to

take even the slightest care of any type of bailed property is guilty of wanton neglect, the equivalence of malfeasance and is held liable to the bailor for ensuing harm. Bailors are therefore entitled to such a ruling and to a trial on damages for the value of their stolen goods unharmed by the fire. PP. 5-10 of the Plaintiffs' Motion for Reconsideration - Statement.

5/20/80 ROBERT H. ARNOLD AND

NANCY C. ARNOLD, Pro Se

----------ORDER----------

IT IS HEREBY ORDERED THAT THE MOTION FOR RECONSIDERATION be and it hereby is ~~allowed~~ denied.

IRVING R. KAUFMAN

WILLIAM H. TIMBERS

HENRY F. WEKER

7/7/81